PUBLIC PROSECUTOR v. PHANG SWEE LAN

[C. A. (Thomson C.J., Hill and Good JJ.A.) April 18, 1960]

[K. L. — F.M. Criminal Reference No. 2 of 1960]

Local Authority — Building operations by unlawful occupier of state land without approval of Municipal Councillors — Municipal Ordinance (S.S. Cap. 133), s.144(10)(a) and (12) — Misconceived prosecution.

This was an appeal from the Magistrate's Court by way of reference under the provisions of section 34 of the Courts Ordinance, 1948. The decision in the appeal to the High Court has already been reported at p. 6 *ante*. This appeal was brought under a certificate given by the learned appellate Judge that the appeal involved a point of law as to whether the effect of section 144(12) of the Municipal Ordinance as applied in the Malay States by virtue of the Municipal (Extended Application) Ordinance, 1948 is to preclude the Municipal Councillors from proceeding under the provisions of section 144(10) against the owner of the building who commences building operations contrary to the provisions of section 144 (7) by making the owner of the land solely responsible at law for the breach of the provisions of subsection (7) aforesaid.

Held: the proceedings were entirely misconceived. There was not a scrap of evidence that the respondent did anything in the way of commencing or carrying on building operations, and it was also clear that in no sense of the word was she the owner of the property in question. Therefore, in no circumstances could she have been convicted of an offence under section 144(10). The learned Magistrate was therefore right in finding her not guilty and discharging her.

Decision of the High Court, p. 6 *ante*, reversed.

Cases referred to:—

(1) *Lim Beng Teck* v. *R.* [1957] M.L.J. 21.

(2) *Tindall* v. *Wright*, 27 Cox C.C. 212, 217.

COURT OF APPEAL; Criminal Reference.

Peter Hall (on a *fiat* from the Public Prosecutor) for the appellant.

G. K. M. Mohan for the respondent.

Thomson C.J. (delivering oral judgment): The truth is that these proceedings are entirely misconceived.

It may well be that there is room for controversy as to the construction of section 144(10)(a) of the Municipal Ordinance as read with sub-section (12) of that section. It may be that where building operations are commenced there is room for controversy as to the criminal liability of the various persons concerned. In particular there may well be room for controversy as to whether the party who is guilty of a criminal offence under the section is the party who commits the actual *factum delicti* or is the owner of the land on which the building is erected. There may be controversy indeed as to whether both these persons are not guilty of some sort of criminal offence.

Again, the case of *Lim Beng Teck* v. *Reg.*[1] which is the judgment of a single Judge of the Supreme Court of the Colony of Singapore may or may not have been properly decided.

None of these questions, however, arises in the present proceedings. I am not overlooking anything the Magistrate has found but on the evidence it is quite clear that the present respondent has not done anything whereby on any reading of the law criminal liability can be imposed upon her. There is not a scrap of evidence, indeed there is evidence to the contrary, that she did anything in the way of commencing or carrying on building operations. It is also clear that in no sense of the word was she the owner of the property in question. Therefore in no circumstances could she have been convicted of an offence under section 144(10).

It follows then that the Magistrate was right in finding her not guilty and discharging her although we may be unable to commend the reasoning by which he arrived at that conclusion. The order of this Court will be that the appeal against the Magistrate's finding is dismissed.

I should not depart from the case without referring to the case of *Tindall* v. *Wright*[2]. That was an appeal by way of case stated which raised two distinct questions. Counsel for the appellant conceded that the first question was concluded against him by a previous decision of the Court but stated that both parties desired a decision on the second question. The Court declined to consider the question and Lord Howart C.J., observed (at p. 217) that if they were to enter upon the problem "however attractive it may be":—

> "we should be offering a decision, at the request of the parties, which would be essentially in the nature of an *obiter dictum* and would not be binding upon any other court. ..... No doubt it does seem a little flaw on the first view of the matters in which the parties upon the one side and upon the other side desire that a particular problem should be solved — although the case from which it arises is disposed of in another way — that this Court should refrain from entering on the inquiry and giving a decision. But ..... the decision so given might easily lead not to enlightenment but the embarrassment for those who have to consider a similar problem afterwards."

Reference answered.

Solicitors: *Shearn Delamore & Co., Cheah Theam Swee & Co.*

Re SYED AHMED ALSAGOFF, DECD.,

[O.C.J. (Tan Ah Tah, J.) April 20, 1960]

[Singapore — Original Summons No. 37 of 1957]

Trust and Trustee — Will — Trustee of Will appointed director of company holding lease of trust property — Trust estate holding no shares in company, but lease giving power to lessor to appoint director of company — Remuneration — Whether trustee liable to account to trust estate — Whether trustee entitled to additional remuneration — Whether director's fees to be refunded should be regarded as capital or income.

This was an originating summons taken out to determine, *inter alia*, certain questions relating to the payment of director's fees to Mr. Phillips, a trustee of the Will of the deceased, who was appointed a director of Raffles Hotel, Ltd., which company held a lease of premises forming part of the trust estate. Clause 14 of the lease gave the lessor power to appoint a director, not subject to retirement by rotation, to sit on the company's board of directors. By article 77 of Articles of Association of the Company Mr. Phillips was deemed to have been appointed pursuant to that power.

Article 88 provided for the remuneration of the Company's directors. The appointment of Mr. Phillips as director was made by himself and his co-trustee. He carried out the duties of a director and received certain remuneration in the form of director's fees under article 81.

The learned Judge had earlier held, in an oral judgment, that Mr. Phillips was not entitled to retain the director's fees paid to him. An alternative question was raised as to whether Mr. Phillips should be paid additional remuneration for acting as a director of the company.

Held: (1) the present case did not justify a departure from the general principle that a trustee is not entitled to derive and profit from his trust or put himself in a position where his interest and duty conflict. Moreover, the testator's estate held no shares in the company and was not directly interested in the amount of profits made, the primary duty of the trustee's nominee on the board of directors being to see that the covenants in the lease were observed. From that point of view the appointment of Mr. Phillips was not necessary and undesirable, although from the point of view of the company he might be a very suitable person to appoint as director. Mr. Phillips should not, therefore, be paid any additional remuneration for acting as a director of the company. *Re Macadam* (3) distinguished;

(2) the director's fees which were to be refunded by Mr. Phillips must be treated as capital and not income. *Re Francis* (5) followed.

Cases referred to:—

(1) *Bray* v. *Ford* [1896] A.C. 44 at p. 51.

(2) *Re Gee* [1948] 1 All E.R. 498 at p. 504.

(3) *Re Macadam* [1946] Ch. 73 at p. 82.

(4) *Re Llewellin's Will Trusts* [1949] 1 All E.R. 487.

(5) *Re Francis* (1905), 92 L.T. 77.

ORIGINATING SUMMONS.

C. H. Smith for the trustees.

T. E. Atkinson for Syed Mohamed bin Ali Alsagoff appointed to represent the beneficiaries.

Cur. Adv. Vult.

Tan Ah Tah J.: By his will dated the 30th December 1868 the testator, Syed Ahmed bin Abdulrahman Alsagoff, appointed his son Syed Mohamed bin Ahmed bin Abdulrahman Alsagoff to be the executor and trustee thereof and gave certain directions with regard to the distribution of his estate. The testator died on the 27th March 1875 and his will was proved on the 19th May 1875. The executor and trustee Syed Mohamed bin Ahmed bin Abdulrahman Alsagoff died on the 3rd July 1906. After that date there were various changes in the trusteeship. In January 1947, owing to the death of a co-trustee, Mr. Syed Ahmed bin Alwi Aljunied became the sole trustee of the estate. By a Deed of Appointment dated the 17th February 1947 Mr. Syed Ahmed bin Alwi Aljunied appointed Mr. J. H. Phillips to act jointly with him as trustee of the testator's estate. In 1957 Mr. R. D. Stewart and Dato Syed Ahmad bin Mohamed Alsagoff were appointed trustees of the estate in place of Mr. J. H. Phillips. The present trustees of the testator's estate are therefore Mr. Syed Ahmed bin Alwi Aljunied, Mr. R. D. Stewart and Dato Syed Ahmad bin Mohamed Alsagoff.

There is no provision for remuneration of the trustees in the testator's will but the question of remuneration was dealt with by the court in 1918. By an order of court dated the 14th January 1918 made in Originating Summons No. 19 of 1917 it was in effect ordered that the then trustees be paid a commission of five per centum on the amount of rents and all other monies in the nature of income received by them. It was also ordered that the then trustees be entitled to retain the sum of $150 per mensem for the expenses to be incurred by them for the salaries of a collector of the rents and profits of the properties belonging to the testator's estate and of an overseer of the same and for other clerical assistance. Since 1918 the trustees for the time being of the testator's estate have been receiving remuneration and retaining the sum of $150 per mensem for expenses in accordance with the terms of this order of Court.

Part of the premises known as Raffles Hotel stood and still stand on land forming part of the testator's estate. With the sanction of the Court, the land together with the premises was leased in 1925 to A. Sarkies and M.S. Arathoon for the term of 70 years from the 1st January 1926. The terms and provisions of the Lease were approved by the learned Judge. Clause 14 of the Lease, which is dated the 31st December 1925, reads as follows:—

"14. Not without the previous licence in writing of the Lessors to assign or sublet the said premises or any part thereof such licence not to be unreasonably withheld Provided nevertheless that (a) if the assignee or sublessee be a limited company no consent shall be given unless the Articles contain a provision that from time to time during the continuance of this demise the Lessor shall have power to appoint a Director not subject to retirement by rotation, but any Director so appointed shall not be a person interested in or connected with any business of a similar nature to the Lessees (b) In the case of a sub-lease no consent shall be given unless the sub-lessee shall become tenant of the Lessors at the rent hereby reserved."

In 1933 the Lease was assigned to a company called Raffles Hotel, Ltd. The articles of association of this company which are relevant for the purposes of this case are articles 77 and 81, which read as follows:—

"77. (1) The lessors to the Company of part of the property known as Raffles Hotel Singapore under a lease dated the 31st day of December 1925 and made between William Joseph Mayson and Mirza Mohamed Ali Namazie of the one part and Arshak Sarkies and Martyrose Sarkies Arathoon of the other part and the survivor of them and their or his assigns for the time being lessors of the said property may from time to time so long as the property so leased is held by the Company appoint himself or one of themselves or any other person to be a Director of the Company and may from time to time remove any Director so appointed and appoint another in his stead and John Harold Phillips, Chartered Accountant of Singapore shall be deemed to have been appointed pursuant to this power.

(2) Any such appointment or removal shall be in writing served on the Company and signed by the persons authorised to make the appointment or removal or by their or his agent authorised in writing.

81. The Directors shall be paid out of the funds of the Company by way of remuneration for their services such sums (if any) as shall from time to time be determined by the Company in General Meeting, and the same shall, unless otherwise determined by the meeting be divided amongst them in such proportions and manner

as the Directors by agreement may determine, or in default of such determination equally."

Various persons served as nominees of the trustees of the testator's estate on the board of directors of Raffles Hotel, Ltd. and eventually, some time after Mr. Phillips had become a trustee of the testator's estate, he was appointed by himself and his co-trustee to be a director of the company. He carried out the duties of a director and received certain sums by way of remuneration in the form of director's fees under the aforementioned article 81.

This originating summons has been taken out in order that certain questions arising out of the administration of the testator's estate may be determined. Some of these questions relate to the payment of director's fees to Mr. Phillips. With reference to one of these questions I have already decided that Mr. Phillips was not entitled as of right to retain the director's fees paid to him in respect of the period during which he was acting as the nominee of the trustees of the testator's estate on the board of directors of the company. In view of that decision, an alternative question has now to be determined. This question is whether Mr. Phillips should be paid additional remuneration for acting as a director of the company, it being contended that he was doing the work for the benefit of the testator's estate.

It is a well-established principle that a trustee is not allowed to put himself in a position where his interest and duty conflict. This principle was clearly stated by Lord Herschell in *Bray* v. *Ford*[1] at p. 51 in the following words:—

"It is an inflexible rule of a court of equity that a person in a fiduciary position . . . . is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict."

In the present case it is clearly the duty of the trustees' nominee on the board of directors to see that the covenants contained in the Lease are duly observed and complied with. If the board of directors were to propose to carry out some plan which would involve a breach of the covenants, the trustees' nominee (who is himself a trustee) might well find himself in a position where his interest and duty would conflict. He might not wish to risk incurring the displeasure of his co-directors and the shareholders of the company and might give his consent to a plan of action which, if he were doing his duty as a trustee, he should have opposed. He would then be failing in his duty to the beneficiaries of the testator's estate. As was said by Harman J. in *Re Gee*[2] at p. 504:—

"The beneficiaries are entitled to the advantage of the unfettered use by the trustee of his judgment as to the government of the company in which they are interested. This they do not get if his judgment is clouded by the prospect of the pecuniary advantage he may acquire if he makes use of the trust shares to obtain or keep for himself a directorship carrying remuneration."

It is to be observed that in the present case Mr. Phillips became a director by the exercise of the powers vested in the trustees of the testator's estate under article 77 (1) of the articles of association of the company. This fact distinguishes the present case from the case of *Re Gee, supra,* where Harman J., after stating the general principle in the words which I have just read, held that the appointment of a trustee as chairman of the board and managing director of a company in which the testator held shares was not procured by the use of the trust interest vested in the executors by the testator's will, and that therefore the trustee was entitled to retain the remuneration which he had received.

In *Re Macadam*[3] Cohen J. said, at p. 82:—

"I think that the root of the matter really is: Did he acquire the position in respect of which he drew the remuneration by virtue of his position as trustee?"

Applying this test to the present case, the answer is clearly in the affirmative.

It is relevant to observe that in *Re Macadam, supra,* Cohen J. also held that the liability to account for a profit cannot be confined to cases where the profit is derived directly from the trust estate.

Counsel who appeared for Mr. Phillips relied on *Re Llewellin's Will Trusts*[4] the headnote of which reads as follows:—

"A testator, who died possessed of a holding of the majority of the shares in L. Co., Ltd., provided by his will: "I also declare that my trustees may at their discretion retain any investments I may have at the time of my decease . . . And in particular in reference to the shares held by me in L. Co., Ltd., I empower my trustees to retain the said shares for so long as they shall think fit and to make such arrangements with the said company in reference thereto and for the appointment of my said trustees or either of them or any other persons as a director or managing director of the said company in my place . . ." The articles of association of the L. Co., Ltd., provided for the remuneration of directors and the managing director.

Held: on the true construction of the will, the words of which must be construed with regard to the terms of the articles of association, the trustees were entitled to procure their own appointment as directors of the L. Co., Ltd., at such remuneration as they might arrange with the company, and were not liable to account for that remuneration to the testator's estate."

It is clear from the judgment that the word "arrangements" as used by the testator in his will was construed to mean and include arrangements to be made with the company not only for the appointment of the trustees as managing director and director of the company, but also for their remuneration in those capacities. The present case is entirely different in that no power is vested in the trustees of the testator's estate to make any arrangements for payment of additional remuneration to any trustee who might be appointed to be a director of Raffles Hotel, Ltd.

It was pointed out by counsel for Mr. Phillips that at the end of his judgment in *Re Macadam, supra,* Cohen J. said that if he could be satisfied that the trustees were the best persons to be directors, he did not think it would be right for

him to expect them to do extra work for nothing. Founding an argument on what was said by the learned judge, counsel for Mr. Phillips submitted that his client was the best person to be appointed director of Raffles Hotel, Ltd. and that, in the circumstances. he should be paid additional remuneration for acting in that capacity.

The headnote of *Re Macadam, supra*, reads as follows:—

"A testator, who died in 1922, directed that, in the event (which happened) of his pre-deceasing his brother, his trustees should be bound to accept, in satisfaction of the amount due to him, at the date of his death, under a partnership contract with his brother, shares in a limited company to be formed for the purpose of acquiring the business. The company was formed in 1926. A summons was taken out by the two trustees of the will, who had been duly appointed directors of the company in 1941 and 1944 respectively, to determine whether they were liable to account to the estate for remuneration received by them from the company in respect of the office of director:—

Held, that, although the remuneration was for services as directors of the company, the opportunity to obtain that remuneration was gained as a result of a discretion vested in the trustees, and that they were liable to account to the trust estate for the sums received by them as remuneration for those services.

Williams v. *Barton* [1927] 2 Ch. 9 followed.

In re Dover Coalfield Extension, Ld. [1907] 2 Ch. 76 and *In re Lewis* (1910), 103 L.T. 495, distinguished."

It is to be observed that the business in *Re Macadam, supra*, was a family concern and that the testator's estate was directly interested in the amount of profits which could be made. It was therefore important to have the best persons to be the directors in order that the business of the company should be carried on in the most profitable manner. In the present case the testator's estate does not hold any shares in Raffles Hotel, Ltd. and is therefore not directly interested in the amount of profits earned. The primary duty of the trustees' nominee on the board of directors is to see that the covenants in the Lease are observed. No doubt he should also see that the company does not become insolvent. But the testator's estate, not holding shares in the company, would only have a remote interest in the amount of profits made. Any intelligent person with a reasonably good knowledge of business could have been appointed to be the trustees' nominee on the board of directors. According to the affidavit filed by Mr. Syed Mohamed bin Ali Alsagoff, one of the beneficiaries of the testator's estate, there were many beneficiaries who would have been quite willing to act as the trustees' nominee on the board of directors in order to protect the interests of the testator's estate and I do not think there would have been any difficulty in choosing a suitable nominee from among them. Now Mr. Phillips had first acted as a director of the company as long ago as 1938 and for various reasons had served on the board of directors from time to time. There came a time when owing to the death of some of the directors he was the only director left who had a knowledge of the pre-war and immediate post-war affairs of the hotel. It can be readily understood therefore that from the point of view of Raffles Hotel, Ltd. he was a very suitable person to be appointed director. But it was not necessary, from the point of view of the testator's estate, for Mr. Phillips to be appointed by the trustees as their nominee. Indeed, from that point of view, such an appointment was undesirable as there was a conflict between the duty and interest of the trustees' nominee. For these reasons the circumstances of the present case can be distinguished from those in the case of *Re Macadam, supra*. In my view, any departure from the general principle laid down by Lord Herschell in *Bray* v. *Ford, supra*, would not be justified in the present case. It follows therefore, in my judgment, that Mr. Phillips should not be paid any additional remuneration for acting as the trustees' nominee on the board of directors of Raffles Hotel, Ltd.

It must be remembered that by virtue of the order of court dated the 14th January 1918 the trustees were already receiving remuneration for their work. This fact distinguishes the present case from all the cases which have been cited by counsel for Mr. Phillips.

The next question concerns the remuneration and allowance of the trustees of the testator's estate. The trustees have in their application asked that their remuneration and allowance be reviewed. In support of this application various matters have been adduced in the affidavits filed by Mr. Phillips and the trustees. I have considered all these matters and have reached the conclusion that the commission of five per centum which the trustees are receiving should not be increased. As to the transport expenses and incidental out of pocket expenses which are incurred by the trustees or some of them, these should, in my view, be paid out of the commission of five per centum which they are already receiving.

It is suggested that a certain sum should be allowed to pay for, *inter alia*, the use of the premises of Messrs. Turquand Youngs & Co., where meetings of the trustees are held and beneficiaries are interviewed. Both Mr. Phillips and Mr. Stewart were partners of Messrs. Turquand Youngs & Co. at all material times and Mr. Stewart is still a partner. In considering this matter it is important to note that the testator did not by his will designate the premises of Messrs. Turquand Youngs & Co., or any other office, as the seat of administration. Furthermore, no allowance for office rent was made by the order of court dated the 14th January 1918. Moreover, there is no evidence to show that any appreciable part of the premises was permanently occupied by the estate. In my opinion no case has been made out for the payment of a rent allowance out of the funds of the estate.

The allowance of $150 per mensem which was sanctioned by the order of court dated 14th January 1918 was intended to be used for the payment of the salaries of a rent collector, an overseer of the testator's property and for other

clerical assistance. It would appear that no overseer is at present employed by the trustees but the rents are being collected by a rent collector and clerical assistance is rendered by some of the members of the staff of Messrs. Turquand Youngs & Co. Counsel for the trustees has submitted that in view of the changed circumstances of the testator's property and the alteration in salary scales since 1918 the allowance is inadequate and should be increased. In arriving at my decision on this point I must take cognizance of the fact that in 1918 the learned judge thought fit to sanction the payment of an allowance in addition to the commission of five per centum. In the circumstances of this case, I think there is force in the submission made by counsel for the trustees that the sum of $150 per mensem is now inadequate. In my opinion the allowance should be increased to the sum of $450 per mensem and there will be an order accordingly.

It remains to consider whether the director's fees which are to be refunded by Mr. Phillips are to be treated as capital or income of the testator's estate. It is clear that unless the fees can be shown to be income they must be treated as capital. In *Re Francis*[5] certain trustees of a testator's estate held a number of shares in a company. These shares formed part of the testator's estate. The trustees were appointed directors of the company and received remuneration for their services as directors. It was held that they were accountable for the remuneration to the testator's estate, there being no provision in the testator's will which enabled them to make a profit for themselves. The learned judge then dealt with the question whether the amount of the remuneration was to be treated as capital or income. The facts of the present case are different in that the testator's estate does not hold any shares in Raffles Hotel, Ltd. Nevertheless, the following observations of the learned judge at p. 78 of the report are, in my view, applicable to the present case:—

> "But how can you say that these moneys which are paid to the trustees are in any sense rents and profits? They are a payment made to the trustees for their services. It has nothing to do with the income of the estate."

In my opinion, adopting the words of the learned judge, the director's fees in the present case have nothing to do with the income of the testator's estate. It follows therefore that they must be treated as capital.

The costs of all parties will be taxed as between solicitor and client and paid out of the estate.

Order accordingly.

Solicitors: *Donaldson & Burkinshaw; Allen & Gledhill.*

Re CHUA GEOK HWA

[O.C.J. (Ambrose J.) April 20, 1960]

[Singapore — Originating Summons No. 145 of 1959]

District Court — Order for possession of land against trespasser — Building exceeding $1,000 in value erected without consent of owner of land — Order for removal of building — Excess of jurisdiction — Courts Ordinance (Cap. 3), ss.67(g) and 58 Application for Certiorari and Prohibition.

The District Court has no jurisdiction under section 68 of the Courts Ordinance to make an order against a trespasser for possession of land if there is on it a building exceeding $1,000 in value which has been erected by the trespasser without the consent of the owner of the land. An order for the removal of the building is a mandatory injunction, an action for which is excluded from the jurisdiction of the District Court by section 67(g) of the Courts Ordinance.

In this case on an application for *Certiorari* and Prohibition the High Court ordered that the judgment of the District Court be removed into the High Court and quashed and that the plaintiff and the bailiff of the District Court be prohibited from executing the judgment.

APPLICATION FOR *CERTIORARI* AND PROHIBITION.

Tan Boon Teik (Director of Legal Aid) for the applicant.

C. F. J. Ess for the respondent.

Ambrose J.: This is an application for an order of *certiorari* to remove into the High Court and quash a judgment of the Civil District Court and for an order of prohibition prohibiting the plaintiff and the bailiff from executing the judgment.

The judgment is in these terms:

> "It is ordered and adjudged that the plaintiff is entitled to recover against the defendant possession of all that the portion of the land at Kampong Eunos, Singapore, being part of Lots 137-38 to 137-80 of Mukim XXIII upon which the defendant has wrongfully and without the plaintiff's consent or authority erected a plank and zinc roof building which is numbered 38.
>
> It is further ordered that the defendant do remove the said building from the abovementioned portion of the said land and do give the plaintiff vacant possession of the said portion of the said land on or before the 30th day of September, 1959."

The second order, which is for the removal of a building from the land, is a mandatory injunction, an action for which is excluded from the jurisdiction of the District Court by section 67(g) of the Courts Ordinance. In making the order the District Court clearly exceeded its jurisdiction.

In my opinion, the District Court also exceeded its jurisdiction in making the first order for possession of the land. There is a building on the land, the value of which, it is not disputed, exceeds $1,000. It is impossible to make an order for possession relating to the land on which the building stands without affecting the possession and ownership of the building. If the first order is allowed to remain, the defendant would be excluded not only from the land but also from the building. Having regard to the value of the building, I think the value of the subject matter of the action exceeds $1,000 and, therefore, the District Court had no jurisdiction to make the first order.

For the above reasons, I order that the judgment of the District Court be removed into this Court and quashed and that the plaintiff and the bailiff of the District Court be prohibited from executing the judgment.

Order accordingly.

Solicitors: *Director of Legal Aid; R. C. H. Lim & Co.*